NO. 82-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL INSURANCE CONSUMER ORGANIZATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF NATIONAL INSURANCE CONSUMER ORGANIZATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is filed on behalf of the National Insurance Consumer Organization, as *amicus curiae*, in support of Respondents. Consent from counsel for both sides has been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

The National Insurance Consumer Organization ("NICO") is a non-profit public interest membership organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. NICO publishes guides and offers advice to help consumers buy insurance wisely, and works for reform of unfair and anticompetitive insurance practices by participating in legislative and regulatory proceedings and through consultation and litigation. Its Board of Directors and staff possess extensive experience in insurance and related public policy matters. NICO's Board is composed of two former state insurance commissioners, one a life and health actuary and the other an attorney, and one former federal insurance administrator, a casualty actuary. The membership of NICO reflects the broad range of interests of the insurance buying public, which consists of virtually all American families. NICO'S members have an important stake in the outcome of this litigation in that they are adversely affected by insurers' practice of reliance upon gender-based classifications. Our female members are particularly adversely affected by the practices at issue in this case. One of NICO's major goals is the elimination of surrogate classifiers, such as gender, so that the industry has incentive to find real risk-related classifications.

INTRODUCTION

This Court held in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), that an employer-operated pension plan which required every woman to contribute 14.84 percent more out of her salary than every man in order to receive the same benefits upon retirement discriminated against women in violation of Title VII.[1] In the case now before this Court, Petitioners challenge the decision of the United States Court of Appeals for the Ninth Circuit[2] that the State of Arizona's practice of offering its employees annuity plans which pay lower monthly benefits to every woman than to every man retiring at the same age, per dollar contributed, violates Title VII. Petitioners raise two arguments before this Court. They argue first that because Arizona chooses to contract with private insurance companies

[1]Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*

[2]*Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *aff'g* 486 F. Supp. 645 (D.C. Ariz. 1980).

which employ sex-segregated mortality tables to provide annuity options, the State should not be held responsible under Title VII for the resulting difference in treatment of individual male and female employees. Second, Petitioners argue that the relief ordered by the courts below is an abuse of discretion. Significantly, Petitioners do not argue that the payment of lower monthly annuity benefits, per dollar contributed, to every woman than to every man based upon the presumption that women, as a class, live longer than men is distinguishable from the practice of requiring every woman to contribute more than every man so as to receive the same monthly benefits upon retirement.

The arguments of a number of *amici curiae* in this proceeding[3] stray far from the issues raised by Petitioners. Certain *amici* attempt to persuade this Court that the payment of lower monthly annuity benefits to every woman than to every man retiring at the same age does not discriminate on the basis of sex and should not be held to violate Title VII. They argue that the annuity plans offered under Arizona's deferred compensation program provide benefits to men and women that are "actuarially equivalent."[4] Some argue that reliance on the generalization that women, as a class, live longer than men cannot be said to discriminate against individual women because there is no way of knowing, at the time annuity benefits are calculated, which individual women will not fit the generalization.[5] In essence, certain *amici* attempt to reargue the relevance of actuarial concepts which were raised in the *Manhart*

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[3] *Amicus Curiae* briefs filed in this proceeding include: *Brief of American Council of Life Insurance as Amicus Curiae in Support of Petitioners ("ACLI Brief")*; *Amicus Curiae Brief of the National Association of Insurance Commissioners ("NAIC Brief")*; *Brief of Teachers Insurance and Annuity Association and College Retirement Equities Fund as Amici Curiae in Support of Petitioners ("TIAA-CREF Brief")*; *Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioners ("EEAC Brief")*; *Brief for the New York State Teachers' Retirement System as Amicus Curiae ("New York Brief")*; *Brief for Amicus Curiae The State of Florida ("Florida Brief")*; *Brief of American Academy of Actuaries as Amicus Curiae ("AAA Brief")*.

[4] *See, e.g., AAA Brief* at 11-16; *ACLI Brief* at 5, 8, 13-14; *NAIC Brief* at 23-25; *EEAC Brief* at 19-22.

[5] *See, e.g., AAA Brief* at 15; *ACLI Brief* at 4, 16; *EEAC Brief* at 18; *New York Brief* at 14.

case and which were rejected by this Court as irrelevant to Title VII analysis. Finally, some *amici* claim (and here they do echo the Petitioners' arguments[6]) that the use of sex-based classifications is necessary to the financial integrity of annuity plans and that affirmance of the decision of the Court of Appeals for the Ninth Circuit will severely disrupt or "revolutionize" the insurance industry.[7]

The purpose of our brief is to address the arguments of various *amici curiae* in this proceeding regarding the "actuarial fairness" of the Arizona annuity plans as well as *amici's* predictions that the insurance industry would be seriously disrupted by this Court's affirmance of the decisions below.

SUMMARY OF THE ARGUMENT

The actuarial arguments raised by *amici* in support of the sex-segregated annuity plans offered under Arixona's deferred compensation program are not distinguishable from those which this Court rejected as irrelevant in *Manhart*. Here, as in *Manhart*, the difference in the treatment of men and women is based upon the generalization that women, as a class, live longer than men. In *Manhart* that generalization was held not to justify a requirement that every woman contribute more than her male counterpart so as to receive the same benefit upon retirement. The Arizona annuity plans use that generalization to justify the practice of paying every woman a lower monthly annuity benefit than every man retiring at the same age, per dollar contributed. There is no principled distinction between the two practices which would allow the latter practice to be found acceptable under Title VII.

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[6] *See, e.g., Petitioners' Brief* at 9.

[7] *See, e.g., EEAC Brief* at 8-15; *NAIC Brief* at 4-9; *ACLI Brief* at 19-22. *Amici's* claim that affirmance of the Ninth Circuit's opinion will severely disrupt or "revolutionize" existing pension and annuity programs is no doubt intended to suggest that the opinions below are contrary to the following dictum in *Manhart:*

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries.

435 U.S. at 717. The quoted dictum merely emphasizes that the focus of Title VII is on employer-employee relations and that this Court's decision in *Manhart* was directed towards that relationship and not to insurance industry practices. The Ninth Circuit's holding that the State of Arizona may not offer its employees annuity options which provide different monthly benefit levels based on sex is not contrary to that dictum.

The concept of "actuarial fairness" is irrelevant under Title VII. "Actuarial fairness" relates to the average differences between the sexes as classes and not to the difference in life expectancies of men and women as individuals. The argument that annuity plans which use sex-segregated actuarial tables do not discriminate against individual women because they can "expect" to receive the same benefits as men, is based upon the false presumption, rejected in *Manhart*,[8] that all individuals of the same gender and age have the same life expectancy and so value a life annuity equally. The "actuarial fairness" arguments raised by various *amici* would also justify the use of race classifications. Neither race nor sex classifications are acceptable under Title VII.

Sex classifications in insurance serve as a proxy for other characteristics, for example, smoking, drinking and exercise habits, which are demonstrably related to mortality and longevity. Indeed, studies indicate that smoking has a more significant relationship to mortality and longevity than does sex.[9] As a result, the annuity plans do not treat men and women who are similarly situated (with regard to factors related to mortality and longevity) equally. Sex-based classifications in annuities treat every individual woman as though she possesses the characteristics of the "average woman." Individual women are injured by these presumptions. Women, as a class, may also be injured by presumptions about the characteristics of the "average woman" because mortality tables apply generalizations about the past behavior of women to current female annuitants.

Amici's arguments that the use of sex-based classifications is not unreasonable because they are easy to administer and less costly than alternatives are overstated and do not justify sex discrimination. The fact that a discriminatory practice may reduce an employer's costs or that its elimination may entail some expense is not germane. Title VII does not contain a cost-based justification. However, even if such considerations could justify discrimination in certain circumstances, those circumstances are not present here. Financially sound annuity and retirement plans

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[8]435 U.S. at 712.

[9]*See, e.g.*, Cowell and Hirst, Mortality Differences Between Smokers and Non-Smokers, 16, 19-20 (State Mutual Life Assurance Company of America, October 22, 1979) (reprinted at 32 Transactions of the Society of Actuaries 185 (1980)).

which do not use sex-based classifications are in use. Other individual characteristics which could be used as risk classifiers in annuities are used as such in other forms of insurance. Finally, the projected costs of equalizing benefits paid to men and women are overstated by the industry.

Even if valid actuarial data could justify differential treatment of men and women, the annuities offered by Arizona should be held discriminatory. These annuities base their payments to women not on female mortality rates but on a crude adjustment of male mortality rates, one applied inconsistently as between insurers participating in the Arizona program. Comparison of these adjustments with similar adjustments made in the life insurance context suggests that this unscientific process is employed in a discriminatory manner.

Amici's attempts to sway this Court by arguing that affirmance of the Ninth Circuit's decision that Title VII prohibits employers from offering annuities which provide lower monthly payments to every woman than to every man of the same age, per dollar contributed, will seriously disrupt or "revolutionize" the insurance industry must also be rejected. These claims are exaggerated and lacking in factual support. Moreover, *amici's* claims about the possible effect of this Court's decision on the insurance industry in general are irrelevant to Title VII analysis. Title VII governs the relationship between employers and employees. The decision below addresses only that relationship.

ARGUMENT

I. THE ACTUARIAL ARGUMENTS OFFERED TO SUPPORT THE USE OF SEX-BASED MORTALITY TABLES IN THE ARIZONA ANNUITY OPTIONS ARE NOT DISTINGUISHABLE FROM THOSE WHICH THIS COURT REJECTED IN LOS ANGELES DEPARTMENT OF WATER & POWER v. MANHART[10]

The annuities offered under Arizona's deferred compensation plan provide lower monthly benefits to women than to men per dollar contributed. That difference is based solely upon the generalization that women, as a class, live longer than men. Certain *amici curiae* argue that this sex-based classification should not be held to violate Title VII because it is based on valid

[10] 435 U.S. 702 (1978).

actuarial principles. A principal argument is that annuity plans of the type offered by Arizona do not discriminate because they provide men and women benefits which are "actuarially equivalent."[11] That argument is offered both as a justification for the practice and as a reason for distinguishing the issues in this case from those addressed in *Manhart*.[12] Because *amici* suggest that the actuarial justifications for the differential treatment of men and women apply differently to the facts of this case than they did in *Manhart*, it is important to compare the two cases at the outset of this discussion.

In *Manhart*, this Court addressed the question of whether an employer-operated pension plan that required women to contribute 14.84% more out of their salaries than men in order to receive the same monthly pension benefit violated Title VII. The Department's practice of requiring different contributions from men and women was based upon the presumption that because women, as a class, live longer than men, it is more costly to provide the same pension benefits to women.[13]

This Court accepted as true the generalization that women, as a class, live longer than men,[14] but nonetheless found that the pension plan discriminated against women in violation of Title VII. In so doing, the Court emphasized that the Congressional purpose underlying Title VII is to proscribe classifications based on race, color, religion, national origin or sex.[15] Title VII's prohibition against such classifications is intended to protect the individual. As a result, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to

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[11] *See, e.g., AAA Brief* at 11-16; *ACLI Brief* at 5, 8, 13-14; *EEAC Brief* at 19-22; *NAIC Brief* at 23-25.

[12] For example, *amicus* EEAC argues that the discriminatory result of the use of sex-differentiated mortality tables in *Manhart* was that women received less take home pay because they were required to purchase annuity plans of greater actuarial value than were men. EEAC argues that the use of sex-differentiated tables in the Arizona annuity offerings is different because it resulted in men and women receiving benefits which have the same present value. *See EEAC Brief* at 17-19. That distinction was discussed and rejected in *EEOC v. Colby College*, 589 F.2d 1139, 1144 (1st Cir. 1978).

[13] *Manhart*, 435 U.S. at 705.

[14] 435 U.S. at 709.

[15] The Court observed that: "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful." 435 U.S. at 709.

whom the generalization does not apply." 435 U.S. at 708.[16]

The Court empnasized in *Manhart* that: "[t]here is no assurance that any individual woman working for the Department will actually fit the generalization on which the Department's policy is based." 435 U.S. at 708. The Court therefore held that the Los Angeles pension plan discriminated against individual women by treating them as though they possessed the characteristics of the "average woman."

The annuity plans offered by the State of Arizona depend upon the same factual generalization the use of which the Court forbade in the *Manhart* case; that is, that because women, as a class, live longer than men, it is more costly to provide women the same annuity benefits. The actuarial principles relied upon for cost prediction are also the same. The only distinction lies in the manifestation of the predicted cost differential. Under Los Angeles' pension plan, the presumed cost differential between men and women was manifested in the requirement that every woman contribute more than every man in order to receive the

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[16]Thus, employers may not employ only men to perform jobs involving heavy work upon the assumption that women are physically unsuited for such jobs. *See, e.g., Rosenfeld v. Southern Pacific Company,* 444 F.2d 1219 (9th Cir. 1971); *Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969). Similarly, employers may not refuse to hire men as flight cabin attendants because of their belief that women are better able to provide comfort to passengers *(See Diaz v. Pan American World Airways Inc.,* 442 F.2d 385 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971), or reject applications from women with preschool-age children based on the assumption that women's family obligations are more relevant to job performance than men's. *See Phillips v. Martin Marietta Corporation,* 400 U.S. 542 (1971).

Insurers' reliance on generalizations about female and male mortality to support the differential treatment of women is equally offensive under Title VII. This Court has rejected the view that sex-based classifications used by insurers should be evaluated differently than other sex-based classifications for the purpose of Title VII analysis. The Court stated in *Manhart* that:

> [T]here is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII.

435 U.S. at 710. Thus, insurers' claims that they must use some form of risk classification in annuity plans do not justify the use of sex as a classification where individual women receive smaller monthly benefits as a result.

same monthly benefits upon retirement. Under the annuity plans offered by Arizona to its employees that presumed cost differential results in smaller monthly annuity benefits to every woman than to every man per dollar contributed. This is a distinction without a difference.

The Arizona annuities provide lower monthly benefits to every woman, assuming that each is likely to live as long as the "average woman" and, therefore, longer than the "average man." Thus, once she retires, a woman will receive smaller monthly benefits, regardless of how long she actually lives, than she would if she were a man. The nature of the discrimination against individual women is, therefore, the same as that which this Court held in *Manhart* violates Title VII.

NICO believes that this Court's decision in *Manhart* controls the legality of Arizona's annuity offerings and that *amici's* arguments supporting the use of sex classifications based on actuarial principles are irrelevant under Title VII. Nonetheless, because such arguments have been brought to the attention of this Court, we believe it is appropriate to address them and to demonstrate why they should be rejected.

II. THE ARIZONA PROGRAM VIOLATES TITLE VII BECAUSE IT DISCRIMINATES AGAINST WOMEN

A. The "Actuarial Fairness" of A Retirement Plan Is Irrelevant Under Title VII.

1. Defenses of sex-segregated retirement plans relying on the expected value of future benefits to the individual retiree ignore the variation in life expectancy among individuals of the same gender and age.

Several *amici* urge this Court to employ the concept of "actuarial fairness" in analyzing the legality of a retirement benefit plan under Title VII, and to hold that a program which is "actuarially fair" to men and women does not discriminate against women, even though a woman will get less money per month than a man who retires at the same age with the same amount of equity in the plan.[17] The Court rejected this approach in *Manhart*. This rejection was proper and ought to be maintained, because "actuarial fairness" relates to fairness to classes, but not individuals, whereas Title VII requires fair treatment of individuals.

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[17] *ACLI Brief* at 13-14; *NAIC Brief* at 22-25; *TIAA-CREF Brief* at 22; *EEAC Brief* at 23-25. *See also AAA Brief* at 10, 12.

It is argued that annuities which classify individuals by sex and age do in fact treat *individuals* fairly because men and women, with their different life expectancies, can *expect* to receive a stream of payments of equal value from their annuities.[18] This "expectations" argument is fallacious. The source of the fallacy is the presumption that all individuals of like gender and age have the same life expectancy and so value a life annuity equally.[19] When this presumption is discarded, analysis of sex-segregated retirement plans clearly reveals their discriminatory nature. The actuarial fairness of a sex-segregated retirement plan bears no necessary relationship to the difference between the life expectancies of individual men and women; rather it is related to average differences between the sexes as classes, *i.e.*, to stereotypes.[20] Furthermore, sex-segregated plans make demonstrably false presumptions concerning individuals based solely upon their sex. For both of these reasons, sex-segregated retirement plans are unfair and discriminatory under an "expectations" analysis, just as under the "actual longevity" analysis adopted in *Manhart*.[21]

2. The annuities in the Arizona program do not treat similarly situated men and women fairly in accordance with their respective life expectancies.

The irrelevance of the actuarial fairness of a classification for the purposes of Title VII may best be illustrated with a purely hypothetical example. Suppose that hypertension is far more prevalent among Lutherans than among Presbyterians. Further, suppose that there is no other difference between Lutherans and

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[18] *ACLI Brief* at 14; *AAA Brief* at 10; *EEAC Brief* at 19-20. The argument is presented in more detail in Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489, 496-98 (1982).

[19] This claim, or the related one that *all* women can expect to outlive the average man of the same age, is made in a number of briefs. *See, e.g., Petitioners' Brief* at 5; *ACLI Brief* at 15; *EEAC Brief* at 10; *TIAA-CREF Brief* at 22. In fact, many factors affect individual life expectancy; among the more obvious are smoking, drinking, eating and exercise habits, presence of chronic heart disease, diabetes or hypertension, and family history. *See Manhart*, 435 U.S. at 712.

[20] A stereotype may be true or false as applied to a class, but such truth or falsity is not relevant under Title VII. *Manhart*, 435 U.S. at 707-08.

[21] *See Manhart*, 435 U.S. at 707-08, 710 n.20.

Presbyterians that affects mortality, so that a group of Lutherans suffering from hypertension and a group of Presbyterians suffering from hypertension would have very similar average life expectancies, as would groups of Lutherans and Presbyterians not suffering from hypertension. Because hypertension shortens life expectancy, and because Lutherans tend to suffer from hypertension more than Presbyterians, we would find that Presbyterians, as a class, live longer than Lutherans.

If actuaries were to look for a relationship between religious affiliation and longevity, they would discover that Presbyterians live longer than Lutherans. They would conclude that it would be actuarially fair to charge Presbyterians more than Lutherans for identical life annuities because Presbyterians will live to collect more money under those annuities. Were this to be done, Presbyterians and Lutherans with hypertension would have the same life expectancies, yet the Presbyterians would receive lower periodic benefits under the "actuarially fair" retirement plan. The same would be true of Presbyterians and Lutherans without hypertension. Thus, *similarly situated* Presbyterians and Lutherans[22] would be treated differently solely on the basis of religion, although as classes Presbyterians and Lutherans would be treated "equally" since the lower monthly payments to Presbyterians would be offset by the greater average longevity of all Presbyterians.

Under these circumstances, Title VII would prohibit an employer from offering higher monthly retirement payments to Lutheran employees than to Presbyterian employees despite the "actuarial fairness" of such treatment. The retirement program would be less valuable to a Presbyterian than to a similarly situated Lutheran, a clear example of discrimination forbidden by Title VII.[23] The violation of Title VII in this hypothetical is similar to that in *Connecticut v. Teal*, ____ U.S. ____, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982), where the Court held that a black job applicant whose application was rejected because he did not pass an allegedly racially discriminatory exam could maintain an action against the employer under Title VII even

[22] *I.e.*, Presbyterians and Lutherans not differing in respects (other than religion) associated with life expectancy.

[23] Title VII requires that "similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977). *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

though the employer's hiring process considered as a whole had no adverse impact upon blacks. The Court's decision in *Connecticut v. Teal* reemphasizes that the focus of Title VII is fairness to the individual.

The hypothetical example illustrates that the actuarial fairness of a retirement plan relates to the aggregate treatment of classes, but has no necessary relevance to the fair treatment of similarly situated individuals. This is because the trait which is the basis for the classification (religious affiliation in the above example) may be a mere proxy for a casually relevant trait (hypertension in the above example) that is *not* shared by all of the individuals in the actuarially defined class. As the National Association of Insurance Commissioners emphasizes *(NAIC Brief* at 27), actuaries are concerned with correlation and cost prediction — causality is not a major concern.[24] In *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), an employer was forbidden to use sex as a predictor of job-effectiveness even though sex was found by the District Court to be the best predictor of the presence of those qualities that would contribute to superior performance. It is no more permissible to use sex to predict the presence of qualities contributing to greater life expectancy.

The proxy problem is not merely hypothetical, for it is present in the instant case. As this Court noted in *Manhart*, social factors such as smoking, drinking, and eating habits affect the differential between male and female life expectancy.[25]

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[24] *See also Nondiscrimination in Insurance: Hearings on H.R. 100 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 194-95 (1980) (hereinafter referred to as *"1980 Hearings"*) (prepared testimony of Charles C. Hewitt, Jr. on behalf of the Risk Classification Committee of the American Academy of Actuaries).

[25] *Manhart*, 435 U.S. at 709-710 & n.17. Smoking habits are especially significant in this regard. Through most of the 1950's and 1960's, about one-half of all adult American men smoked, as opposed to only about one-third of adult American women. U.S. Surgeon General, *Smoking and Health* (1979), Appendix, Table 1, p. 9. Studies indicate that smoking habits have a greater impact on mortality than does gender, and so are a better predictor of longevity. *See, e.g.*, Cowell and Hirst, *Mortality Differences Between Smokers and Non-Smokers* 16, 19-20 (State Mutual Life Assurance Company of America, October 22, 1979) (reprinted at 32 Tranactions of the Society of Actuaries 185 (1980)). Cowell and Hirst, at page 21 of their paper, reported evidence indicating that the higher smoking rate of men does in fact result in overstating the underlying mortality differential between the sexes, for the differential is smaller in a subgroup of male and female policyholders with more similar smoking habits.

Occupation, although not specifically mentioned in *Manhart*, is another social factor which affects the differential between male and female life expectancy.[26] Because gender serves at least in part as a proxy for these other characteristics, the sex-differentiated actuarial tables do not reflect the relative life expectancies of similarly situated men and women. Thus, the annuity rates based upon those tables discriminate against women because they penalize women for differences in life expectancy over and above those which may be attributable to sex alone.[27] Actuarial fairness, then, does not justify the facial gender discrimination present in an employee annuity plan which penalizes all women because the average women of a given age will, for reasons known and unknown, outlive the average man of that age.

Because there is much that is unknown about determinants of longevity, it is impossible to say what the effect of sex might be on life expectancy, all other things being equal. We do not know what to hold equal; we do not know how to define "similarly situated men and women." *Amici* differ among themselves as to whether taking more variables into consideration would lead to a narrowing or a widening of the differential between rates for men and women otherwise identical in all respects under consideration.[28] Evidently, there are as many "actuarially fair"

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[26] *See* Anderson, *A Critique of the Manhart Brief*, The Actuary, May 1978, at 5, which, in addition to noting that occupation is an important factor affecting mortality, states that a 1976 paper by John M. Bragg presented to the Twentieth International Congress of Actuaries (Tokyo, 1976) implies that socio-economic class is at least as significant a factor as sex. Occupation is related to socio-economic class.

[27] For example, it can be inferred that a female non-smoker would receive payments of lower value over her lifetime from an annuity offered through the Arizona program, than would a male non-smoker, were each to live as long as the average non-smoker of their respective genders.

[28] NAIC states (*NAIC Brief* at 26) that the addition of other classifications would reduce but not eliminate the effect of sex on mortality. The Academy states (*AAA Brief* at 14 n. 16) that a study reported by Dr. D.L. Wingard found that the "difference in relative mortality risk for men and women" increased when a statistical technique was used to control for the effect of certain other demographic and behavioral factors. In fact, the cited report indicates that the statistical adjustment increased the *ratio* of relative mortality risk of men to that of women, but gives no indication whether the increase is statistically significant. Furthermore, the reliability of the statistical technique used in that study has been questioned. *See* Gordon, *Hazards in the Use of the Logistic Function With Special Reference To Data From Prospective Cardiovascular Studies*, 27 J. Chronic Diseases 97 (1974).

sex differentials as there are classification schemes, and when more classifications are used the system is "more fair." *See NAIC Brief* at 26. The Court should not sanction a mode of Title VII analysis in which fairness is so fluid a concept.

To conclude, the premise of the expectational argument that actuarially fair sex-segregated annuities do not discriminate against individual women is that women have greater life expectancies than do similarly situated men and for that reason can expect to receive lower periodic life annuity benefits for a longer time. This premise has been shown to be false, or at least suspect, for actuarial fairness to groups does not bear on equality of treatment of similarly situated men and women. Therefore, the expectational argument has no weight, and there can be no justification for the facial discrimination present in sex-segregated annuity plans such as those offered through the Arizona program.

3. The annuities in the Arizona program make impermissible presumptions concerning individuals on the basis of sex.

The proxy problem explained in the previous section has demonstrably discriminatory impact on identifiable individual women. The discrimination arises because sex-segregated retirement plans implicitly attribute characteristics to all presently covered women solely because in the past more women than men tended to have those characteristics. This is most easily illustrated by considering smoking behavior. The mortality tables used by insurers reflect the fact that when most actuarial tables were designed, a substantially larger percentage of men that women smoked.[29] The effect on mortality of this difference in smoking behavior is incorporated into the annuity plans offered by the insurer through the size of the female setback. Thus, the annuity plan implicitly says to ev ry women, "You will receive a lower monthly payment than you otherwise would because, as a woman, it is less likely that you smoke than that the average annuitant smokes." This presumption is applied to every woman solely because she is a woman, regardless of its accuracy. The female retiree who smokes two packs a day has no opportunity to get her benefits increased by proving that the presumption which the plan makes about her smoking habits

[29] *Supra* note 25, at 12.

because she is female is wrong. This is classic discrimination: the use of gender to predict or replace consideration of an individual's actual relevant traits. It is no different from using gender to predict an individual's ability to perform strenuous work.

An annuity plan using only age classifications, of course, would implicitly treat all men and women as though they were as likely as the average person to exercise regularly, smoke, or drink excessively. This treatment would be incorrect in many individual cases, but it would *not* be a false characterization made on the basis of a person's sex. By making no gender classification, a unisex pension plan avoids making any false judgments about an individual *on account of the individual's sex.* It errs, but in a sex-blind fashion. Therefore, unisex plans, but not sex-segregated plans, pass muster under Title VII.

Women as a class can be injured by presumptions built into the sex-segregated tables as well. For example, the difference between male and female smoking rates has narrowed dramatically in recent times.[30] According to the stipulations, at least one of the annuities offered through the Arizona program uses mortality tables published in 1971. Use of such out-of-date statistics overpenalizes today's women in this respect by ignoring their increased propensity to smoke. Thus, by classifying annuitants by gender but failing to classify annuitants in accordance with their smoking habits, the Arizona program actually penalizes women *as a class* as well as individually. Again, while this is demonstrably true with respect to smoking, it may be true as well with respect to other factors for which gender serves as a proxy.

4. Sex classification in employee insurance benefits is no more "fair" than race classification would be; both are prohibited by Title VII.

Leading commentators on both sides of the argument regarding the acceptability of sex classifications in employee benefit plans agree that sex classifications are, in principle, neither more nor less defensible than race classifications would be.[31] The actuarial arguments now raised in support of sex

[30] *Smoking and Health, supra* note 25, at 12, Appendix, Table 1, p. 9.

[31] *See* Brilmayer, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis,* 47 U. Chi. L. Rev. 505, 536-39, (1980) (hereinafter cited as *"Brilmayer"*), arguing that sex classifications, like race classifications, are impermissible, and Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited,* 49 U. Chi. L. Rev. 489, 511-12 (1982), arguing that race classifications, like sex classifications, should be permissible.

classifications in insurance were once raised to defend the insurance industry's use of race classifications.[32] The insurance industry's explanations of why it can no longer justify the use of race classifications further undercut claims that sex classifications are legitimate. There are three explanations for the absence of racial classifications from modern insurance policies: that race is not a good predictor of longevity, that race is a mere proxy for other factors, and that race is not a socially acceptable classification.[33] Closer examination reveals that only the third explanation represents a plausible distinction between race and sex classifications. That distinction is clearly irrelevant under Title VII.

One explanation for the absence of racial classifications from retirement programs is: "there is now no substantial difference between the mortality rates of whites and non-whites at the older ages. However, there continues to be a disparity between the life expectancy of non-white males and non-white females, just as there continues to be a disparity in the life expectancy of white males and white females."[34] This statement is revealing in light of its qualification. Non-white mortality rates are substantially higher than white mortality rates at lower ages,[35] yet the industry does not discriminate on the basis of race in life insurance or

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[32] *See* S. Rep. No. 671, 97th Cong., 2d Sess. 5-6 (1982). The Senate Report states, at 5, that:

> [I]n its announcement of March 10, 1881, that policies on "colored lives" would have two-thirds face value of policies on white lives for the same premium, the Prudential Insurance Company contended that its action:
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> > ... was not only justified, but necessary for its own safety and equity to the white policyholders, who as a class are subject to a mortality less than two-thirds as high as the rate prevailing among the colored people.

[33] *Id.* at 7.

[34] *1980 Hearings* at 197 (statement of Charles C. Hewitt, Jr.).

[35] *Id.*, at 166, 241. The table "Expectation of Life at Various Ages in the United States 1977" (Source: National Center for Health Statistics, U.S. Dept. of Health, Education and Welfare) (*1980 Hearings* at 245) shows that life expectancy for non-whites is lower than that of whites at ages up to age 70. At many age levels, there is a greater difference between black and white mortality rates than between male and female mortality rates. S. Rep. No. 671, 97th Cong., 2d Sess. 7 (1982).

death benefit plans. Thus, there must be some other explanation for the absence of racial classifications.

The second explanation for the non-use of race as a classification is that "race is actually a surrogate for other factors: diet, housing, medical care, education, and employment opportunities."[36] This explanation is quite curious, because in defending plans which employ sex classifications insurers insist that the use of sex as a cheap proxy for other factors is a legitimate actuarial practice and that causality is unimportant.[37] In any case, actuarial data does not purport to separate intrinsic effects of factors from proxy or surrogate effects. There is no convincing actuarial evidence that gender *per se* is more determinative of mortality risk than race *per se*.

The third explanation for the non-use of race as an actuarial classification, and the only plausible one, is that race classifications are no longer socially acceptable. "Laws, regulations and public opinion all constrain risk classification systems within broad social acceptability guidelines."[38] As this Court noted in its decision in *Manhart*, "[a]ctuarial studies could unquestionably identify differences in life expectancies based on race or national origin as well as sex." 435 U.S. at 709 (footnote omitted). However, Congress has made the decision that "classifications, based on sex, like those based on national origin or race, are unlawful." *Id.* Neither race nor sex classifications in annuity plans are acceptable under Title VII.

B. Arguments that the Use of Sex-Based Classifications Is Not Unreasonable Because Alternatives Are More Difficult or Expensive to Administer Are Overstated and Do Not Justify Discriminatory Treatment.

Sex is the *sole* classification, other than age, used in the Arizona annuity plans to predict longevity. Yet, insurers and actuaries generally acknowledge that a number of characteristics

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[36] *1980 Hearings* at 196 (statement of Charles C. Hewitt, Jr.)

[37] *Id.* at 195 (statement of Charles C. Hewitt, Jr.), 228-29 (American Academy of Actuaries Comm. on Risk Classification, *Risk Classification: Statement of Principles*).

[38] *Id.* at 228.

other than sex are statistically related to mortality.[39] Behavioral and social factors statistically related to mortality include smoking habits, physical condition, geographic location, family history, and recreational and occupational activities.[40] Certain racial and religious classifications are also statistically related to differences in mortality rates at some ages.[41] The Arizona annuity options' use of sex as the only risk classification, other than age, must be questioned in light of the knowledge that alternative classification systems are available (*i.e.*, those which use only age or which also use classifications that are not proscribed by Title VII).

Those who defend the use of sex-segregated mortality tables claim that sex possesses certain advantages over other characteristics as an actuarial classification; *e.g.*, that sex mortality differences appear to be stable over time[42] and that sex is a reliably and inexpensively determined characteristic.[43] The social and behavioral factors for which sex classification now serves as a proxy, the argument continues, cannot be used directly because they are expensive to ascertain reliably and are imprecise.[44]

None of these arguments provides sufficient reason for this Court to carve out an exception from Title VII's proscription

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[39] *See, e.g., NAIC Brief* at 26-27; *see also Nondiscrimination in Insurance Act of 1981: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 79 (1981) (written statement of B.J. Lautzenheiser on behalf of the American Council of Life Insurance and the Health Insurance Association of America) (hereinafter *"1981 Hearings"*); *id.* at 131 (written statement of S.R. Woodall, Executive Vice President, National Association of Life Companies).

[40] *1980 Hearings* at 1968. (statement of Rep. Dingell, sponsor of H.R. 100).

[41] For example, Mormons and Seventh Day Adventists, as a class, have longer life expectancies than the general population of the United States. Jews, as a class, have a shorter life expectancy at age sixty-five than the total population at that age. *1980 Hearings* at 165.

[42] The current claim that sex mortality differences appear to be stable over time is questionable in light of insurers' acknowledgement of and explanation for the fact that insurers did not differentiate life insurance premium rates by sex prior to the 1950's. One explanation given is that "the mortality differential was significantly smaller then than it is now..." *1980 Hearings* at 93 (written testimony of B.J. Lautzenheiser on behalf of American Council of Life Insurance and Health Insurance Association of America).

[43] *See, e.g., NAIC Brief* at 26-27.

[44] *Id.*

against differential treatment based on sex. Title VII does not allow alleged considerations of convenience and administrative efficiency to serve as justifications for sex discrimination. Even if cost were relevant, no necessity for using sex classifications has been shown to exist. The asserted advantages of using sex as a classification relative to other factors are greatly overstated. Moreover, financially sound retirement plans exist which do not use sex-segregated mortality tables.

The argument that the use of sex as a classifier is justified because sex is an inexpensively and conveniently determined characteristic deserves little weight in light of Title VII's proscription against sex discrimination. Title VII does not contain a cost-based justification. The fact that a discriminatory practice may reduce costs or that its elimination may entail some cost is no defense. It may well be less costly to exclude all women from jobs requiring unusual strength than to test each individual applicant. Nonetheless Title VII may require that an employer must test applicants in order to treat individual women fairly.[45]

No need exists to use sex-based classifications in setting annuity and pension benefit levels. Almost all defined benefit pension plans and group insurance plans, including the Federal Government's Civil Service Retirement System, are gender-neutral.[46] Indeed, Arizona's State retiremen. plan is among these.[47] The principal objection given by insurers to the use of gender-neutral plans is that they would be more costly because overall benefit levels would be increased.[48] In fact, estimates vary of the additional cost per year which might be incurred under gender-neutral plans. According to ACLI, "an internal study conducted by the Council estimates that a prohibition against

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[45] *See Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *see also Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219 (9th Cir. 1971). This Court has repeatedly rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications under an Equal Protection Clause analysis. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 143, 150-52 (1980); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

[46] *1981 Hearings* at 28 (Statement of Rep. Dingell, sponsor of H.R. 100).

[47] *Petitioners' Brief* at 3 n.4.

[48] *See, e.g., ACLI Brief* at 3.

using sex-specific actuarial tables would increase the cost of retirement plans by about two billion dollars per year.'[49] By contrast, a United States Labor Department cost study of "topping up" under the Equal Employment Opportunity Act indicates that the unfunded liability for private pension plans is expected to be under $500 million.[50] That unfunded liability compares to industry assets and reserves of over $400 billion.[51]

Sound annuity plans can be developed using no classifications, other than age, or by using a wide variety of other unforbidden characteristics for classifying risks. *Amici* argue, however, that the use of other characteristics, such as smoking habits and health, as risks factors would be too unreliable or expensive. There is little merit to that argument. It is undisputed that insurance companies routinely use such factors in pricing other forms of insurance.[52] For example, the American Academy of Actuaries states that "[o]ffering lower premiums to nonsmokers is now a widely used life insurance practice." *AAA Brief* at 14 n.17.[53] Substandard rates in life insurance have been developed for physical criteria such as obesity and hypertension,[54] and other factors such as occupation. A Statement of Principles regarding

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[49] *Id.* In making this estimate, ACLI assumed that the equalization of benefits payments between individual men and women would be accomplished by increasing, in the case of each benefit that might be paid under a retirement plan, the amount of the lower benefit (payable to retirees of one sex or the other) to the level of the higher benefit (payable to the opposite sex). This approach is sometimes referred to as "topping up." The cost estimates would be lower if it were assumed that other methods of equalizing benefits would be used.

[50] Cited in Senate Comm. on Commerce, Science and Transportation, Fair Insurance Practices Act, S. Rep. No. 671, 97th Cong., 2d Sess. 18 (1982).

[51] *Id.* Thus, even the Academy's estimate of 2 billion dollars is only one-half of one percent of industry assets and reserves.

[52] This fact is acknowledged by several *amici curiae*. *See ACLI Brief* at 11-12 n.2; *AAA Brief* at 14 n.17; *EEAC Brief* at 21 n.12.

[53] Given its acknowledgment of that fact, the Academy's conclusion that the use of factors such as smoking habits in risk classification for *annuity* plans is prohibitively difficult because "persons who smoke heavily may deny it" *(id.* at 13) seems curious.

[54] *1980 Hearings* at 141 (statement of B.J. Lautzenheiser on behalf of American Council of Life Insurance and Health Insurance Association of America).

risk classification prepared by the American Academy of Actuaries Committee on Risk Classification and submitted as testimony in Congressional hearings acknowledges that occupation and geographic location, as well as sex and age, are examples of factors that are generally reliably determinable.[55] Moreover, research indicates that at least one factor — smoking — has a more significant statistical relationship to mortality than does sex.[56] Arguments that use of sex as a risk classification is necessary, and therefore permissible under Title VII, must be rejected.[57]

C. The Method Used by Insurers to Reflect in Their Rates the Mortality Differences Between Men and Women Is Imprecise and Is Applied in A Manner that Is Inconsistent and Appears to Be Discriminatory.

Reliance on statistical data appears to lend a certain credibility to the practice of sex classifications in annuities by suggesting that factors used for risk classification are objective and accurate. For example, *amicus* TIAA-CREF states that: "[t]he factors taken into account in classifying risks for annuities are those that are stable, significant and objectively measurable." *TIAA-CREF Brief* at 6. However, risk classification is by no means an objective science. It involves a substantial degree of judgment, from the selection of actuarially relevant risk classifications[58] to the construction of mortality tables based on those classifications.

There are numerous inaccuracies in the manner in which sex-segregated mortality tables are derived and applied. Moreover, those inaccuracies frequently work to the detriment of women and sometimes men, both as individuals and as classes. Such inaccuracies raise serious doubts about the "fairness" of using sex-based mortality tables and further support the conclusion that actuarial statistics cannot justify the facially discriminatory treatment of women under the Arizona annuity offerings.

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[55]This Statement of Principles is reprinted in the *1980 Hearings* at 226.

[56]*See, supra* note 25, at 12.

[57]We concur with the American Council of Life Insurance that "it would undoubtedly be impermissible to base an employment related decision on a characteristic related to an employee's sex if an alternative criterion was easily available." *ACLI Brief* at 18.

[58]*1980 hearings* at 214 (Risk Classification: Statement of Principles).

Our observations regarding the insurance industry's inconsistent and inaccurate use of the statistical data in creating sex-segregated mortality tables are not intended to suggest that paying women smaller monthly benefits than men would be justified under Title VII if the tables more accurately reflected actual mortality experience. As this Court clearly stated in *Manhart*, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." 435 U.S. at 708. In addition, the infirmities of the "actuarial fairness" approach discussed earlier in this section would remain. However, if the use of true generalizations does not justify facially discriminatory treatment, surely the use of inaccurate generalizations is impermissible.

The inaccuracies in the insurance industry's use of sex-segregated mortality tables become apparent when one considers the manner in which the tables are derived. Although separate tables for each sex could be constructed based upon actual mortality data, very few insurers, and none involved in the Arizona program, do so. The more common technique, that actually used by all insurers in the Arizona program,[59] involves constructing a mortality table for men, based on actual experience, and then applying that table to women after subtracting a fixed number of years from each woman's age.[60] This technique is known as "setting back" the male table.[61]

The use of setbacks is, at best, a crude approximation for actual experience. The statistical difference between the life

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[59]Some of the Arizona annuity plans instruct the user to employ a specific setback. Others provide tables with separate columns for ages, one labelled "Male" and the other "Female." A third column lists the amount of annuity. By subtracting the age in the male column from the age in the female column on the same line, the number of years of setback may be determined. Thus, although the stipulation recites that "Lincoln National ... uses no 'setback', but rather has separate tables for males and females" (J.A. 12), the table of rates included in Arizona's contract with Lincoln National shows a difference in benefits equivalent to a setback of four years on the male tables at ages 50 to 75 (Ex. 3, Article 2.07).

[60]This practice is common despite the fact that both male and female tables are available. *See, e.g.*, Fellers and Jackson, *Noninsured Pensioner Mortality: The UP-1984 Table*, 25 Proceedings, Conference of Actuaries In Public Practice 456, 459 (1976).

[61]The use of setbacks from the male table for calculating benefits for females is the technique used by most insurers. *Brilmayer* at 506.

expectancies of men and women varies from age to age and tends to decrease with age, including ages after sixty.[62] Thus, the use of a fixed number as a setback for sex to calculate the level of periodic benefits, regardless of the age of the annuitant upon retirement, does not and cannot accurately reflect the statistical data the industry presents as a justification for the differential treatment of men and women.[63]

The crudeness of the approximations used by insurance companies as setbacks for calculating periodic payments to female as opposed to male annuitants is also evident from the fact that setbacks vary between companies. The record in this case shows that three different fixed setbacks were used by the annuity companies involved in the Arizona program. The parties to this proceeding have stipulated that:

> National Investor uses the annuity table based on male mortality tables exclusively with a six year "setback" for females. "Setback" as used here means the real age of a female is reduced six years. Thus a 65 years old woman is treated as being 59 years old and her monthly annuity based on that age, while a 65 years old male has his monthly annuity based on age 65.

(J.A. 12). The amount of the setbacks used by the other insurance companies is readily determined from the face of each policy. The Variable Annuity Life Insurance Company contract shows a setback of four years from beginning payout ages 55 to 75 (Ex. 5 at 5); the ITT Life Insurance Corporation shows a setback of five years from beginning payout ages 21 to 80 (Ex. 7 at 8-10).

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[62] *See 1980 Hearings* at 245 (Expectation of Life at Various Ages In the U.S. in 1977 (Source: National Center for Heath Statistics, U.S. Dept. of Health, Education and Welfare)). *See also Brilmayer* at 530 n.117.

[63] Not long after this Court's decision in *Manhart*, the insurance industry set up a committee to consider whether a separate mortality table, based on female lives, should be created for life insurance purposes. In July, 1979, a committee of the Society of Actuaries circulated to its members a report stating that "a single age setback cannot approximate the male-female mortality differential across the entire spectrum of ages" and recommended the creation of a female mortality table. The report, entitled "Recommendation to the Board of Governors of A New Minimum Mortality Standard for the Valuation of Individual Ordinary Life Insurance" (on file with the EEOC), is due to be published in a forthcoming issue of the Transactions of the Society of Actuaries.

Thus, under the Arizona deferred compensation program, a given woman selecting an annuity option could be considered to have the same life expectancy as a man four, five or six years her junior. The "actuarially fair" difference in payments between that woman and a man of the same age thus depends upon the woman's choice of an insurance company and not at all upon her individual characteristics or her identity as a member of the class of women.

Another, more blatant inconsistency in the insurance industry's use of setbacks is revealed by a comparison of the setbacks used by insurance companies in calculating life insurance premiums and those employed in calculating periodic annuity payments. In setting premiums for life insurance policies, insurance companies typically employ a setback of three years.[64] However, in calculating periodic annuity payments, insurance companies (often the same companies) use a larger setback, traditionally six years.[65] The use of a smaller setback in setting rates for life insurance than rates for annuities is curious when one considers that the current difference in life expectancy of men and women of the same age is higher at earlier ages, when most people purchase life insurance, than it is at later ages, when annuity payments begin.[66] Improper use of actuarial evidence

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[64] *See NAIC Brief* at 25. *See also 1980 hearings* at [illegible] (written statement of D.A. Steele, Staff Counsel, Women's Rights Project, American Civil Liberties Union); *Brilmayer* at 530 n.117. A 1979 report of a committee of the Society of Actuaries concluded that the only ages at which a three-year setback could be deemed proper are ages 40-42. *See supra* note 63, at 23.

[65] *See NAIC Brief* at 25. It is also standard industry practice to apply different mortality tables to the same individual in pricing life insurance than in calculating annuity benefits. *See* McGill, *Fundamentals of Private Pensions* 335 (4th ed. 1979).

> For example, at age 30, the 1958 C.S.O. Table is used to charge premiums for a female under a life insurance policy on an assumed mortality rate of 199 deaths per 10,000, while payout rates on an annuity contract for the same person are computed on the 1971 I.A.M. Table which shows a mortality rate of 47 deaths per 10,000 at that age ... In addition, the data generally used is in dollars of exposure, rather than numbers of individual deaths, a method which further distorts sex mortality rates since males carry at least 10 times the amount of insurance that females carry.

1981 Hearings at 29 (written statement of Rep. Dingell) (footnote omitted).

[66] *See 1980 Hearings* at 245 (Expectation of Life at Various Ages in the United States in 1977 (Source: National Center for Health Statistics, U.S. Dept. of Health, Education and Welfare)). *See also Brilmayer* at 530 n.117.

would inure to the benefit of insurance companies, allowing them to charge women higher rates for life insurance and pay them lower monthly annuity benefits than that evidence would support. Indeed, *amicus* NAIC concedes that the difference in setbacks used for annuities and life insurance looks discriminatory and needs to be justified. *NAIC Brief* at 25.[67]

More fundamental problems with the accuracy of the setbacks employed by insurance companies to create mortality tables for women result because they are extrapolated from tables which do not present actual mortality data. For example, in preparing the life tables from the United States Census the collected data are adjusted to conform to certain expected trends. For example:

> For each pair of published life tables for males and females of a given color in a given State it was considered that the q_x[68] value for females at each age should be less than the corresponding value for males .... In every instance in which an adjustment was considered necessary, it was effected by redistributing by age the numbers of deaths into two or more adjacent groups, so the total number at all ages remained unchanged .... In many cases, the number of deaths in the age groups involved were redistributed by age in proportion to the corresponding numbers for the same sex and color for the United States. When this procedure failed to remove the observed anomalies, deaths were redistributed by age in a more arbitrary manner.

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[67]The fact that the use of sex-segregated mortality tables in pricing life insurance policies results in lower premiums for women than for men is sometimes used to suggest that the use of sex-segregated mortality tables by the insurance industry is not discriminatory. *See, e.g., ACLI Brief* at 11-12 n.3; *TIAA-CREF Brief* at 14. That argument is without merit. This Court forcefully pointed out in its opinion in *Manhart* that the focus of Title VII is fairness to the individual. 435 U.S. at 708. The use of sex-segregated mortality tables in setting life insurance premiums disadvantages men in the same manner it disadvantages women annuitants and is equally impermissible. As this Court emphasized in the context of a racially discriminatory practice which may operate against whites as well as blacks: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

[68]"q_x", the life table mortality rate, is the fraction or proportion of a group of persons at age x. who are expected to die before attaining age x + 1.

National Center for Health Statistics, *Methodology of the National and State Life Tables for the United States: 1969-71* (1975) at 3-17. Thus, a general statement that studies show lower mortality rates for women than for men at all ages conceals circular reasoning because mortality rate tables are adjusted to show that result.

III. BANNING DISCRIMINATORY TREATMENT OF FEMALE EMPLOYEES WILL NOT DESTABILIZE RETIREMENT PROGRAMS OR ENCOURAGE EMPLOYMENT DISCRIMINATION.

A number of *amici* assert that dire consequences will ensue should the Court affirm the illegality of the Arizona program. They claim that changes in the sexual composition of annuitant pools resulting from "adverse selection" will destabilize pension and annuity plans.[69] A related argument is that insurers will be unable to predict accurately the cost of annuity plans if they cannot use sex classifications, leading to an abandonment of plans with guaranteed benefits levels.[70] One *amicus* goes further, arguing that forcing the use of unisex plans will make women more expensive to employ, thereby creating an economic incentive encouraging discrimination by employers.[71] All of these fears are demonstrably unfounded.

Every ill consequence which *amici* argue would stem from the use of annuities that do not classify by gender must logically stem as well from the use of annuities that do not classify on the basis of smoking, obesity, alcohol consumption, or amount of exercise. Consider smoking. Adverse selection will take place as non-smokers (like women) flock to annuities while smokers (like men) steer away from them (and towards life insurance). Fluctuations in the number of smokers in the work force will affect the soundness of the plans. Yet no annuity plan offered through the Arizona program uses a setback for non-smokers. Evidently, the insurance industry considers the problems resulting from adverse selection by smokers to be sufficiently

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[69] *See ACLI Brief* at 19-22; *NAIC Brief* at 7-9; *TIAA-CREF Brief* at 5; *New York Brief* at 5, 14; *AAA Brief* at 10-11, 18; *Florida Brief* at 21-24.

[70] *AAA Brief* at 17.

[71] *ACLI Brief* at 9, 20, 21 n.12.

minor that eliminating them by introducing a smoking classification is not believed to be worthwhile.[72]

It may be natural for an insurer to overlook or downplay adverse selection relating to classifications not made by the insurer (smoking, obesity, level of physical activity, drinking habits, etc.) while dreading adverse selection resulting from abandonment of a classification presently used (sex), but there is no real difference. Failure to use a smoking classification has not destroyed pension and annuity plans, although smoking appears to have a greater impact on mortality than does gender.[73] Neither has failure to consider obesity, drinking habits, or medical history. Hence, there is no reason to believe that unmanageable difficulties will appear if gender classifications are eliminated.[74]

No reason exists to believe that the simultaneous availability to prospective annuity purchasers of sex-segregated annuities (in the open market) and unisex annuities (through employers) would disrupt insurance markets, because a similar situation now exists with respect to smoker classifications in life insurance policies: some life insurers treat smokers and non-smokers differently, and some do not.[75] Furthermore, because under the Arizona program employees must surrender the benefits of further tax deferral in order to take a lump sum distribution and purchase an annuity on the open market, the number of men electing to receive life annuities probably would not fall off

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[72]One *amicus* repeats an argument attributed to B.J. Lautzenheiser to the effect that more classifications (such as smoking and obesity) are not used in life annuity plans because people with these life-shortening traits are more likely to be interested in fixed-term annuities or in life insurance than in life annuities. *EEAC Brief* at 21-22 n.12; *see also ACLI Brief* at 11-12 n.2. The indifference with which the prospect of adverse selection by obese people or smokers is viewed contrasts sharply with the fear expressed at the prospect of adverse selection by men. *See, e.g., NAIC Brief* at 7-8. The situation is the same, yet favorable rates are offered to men to induce them to buy annuities, but not to smokers or the obese.

[73]*See supra* note 25, at 12.

[74]It has been noted that the insurance industry's arguments opposing the banning of gender classifications parallel the industry's arguments of a century ago defending the use of race classifications. *See, e.g.*, S. Rep. No. 671, 97th Cong., 2d Sess. 5-7 (1982). Obviously, the industry survived the outlawing of racially discriminatory practices.

[75]As of May 20, 1981, between 30 and 100 of the 1800 companies offering life insurance in the United States gave discounts to non-smokers. *1981 Hearings* at 148.

significantly. For this reason, the elimination of sex-segregated employee pension and annuity plans is highly unlikely to trigger adverse selection of a magnitude sufficient to jeopardize retirement programs.

Arguments of *amici* stressing the seriousness of the "accurate prediction" problem are no more credible than the "adverse selection" claims. Because of the statistical correlation between gender and longevity, a change in the sexual composition of an insured pool may affect the cost of annuity coverage to some extent. It is argued that a prohibition from charging different rates to men and women would impair an insurer's ability to handle this "risk." However, a change in the percentage of smokers in the insured pool, or the percentage of heavy drinkers, or of diabetics, would pose the same problem, yet insurers operate successfully in the face of these risks. No explanation has been put forward to show that gender classification is *uniquely* necessary. Furthermore, most defined benefit pension plans, such as the one offered by the State of Arizona, now provide equal monthly benefits for similarly situated male and female retirees. *See AAA Brief* at 5. If pension plans can be operated in a unisex fashion, it stands to reason that annuity plan can be as well.

Widespread employment discrimination against women as a result of the use of unisex annuity plans is unlikely because it would contradict much that we know about job markets. If businesses sought out employees on the basis of projected pension costs, then the smart job hunter would know the value of including in his or her resume that he or she smokes, is a "junk food junkie," doesn't exercise, and had no grandparents who lived to 70. Clearly, this is not the way the world works. If businesses do not discriminate against non-smokers or exercise buffs to save on pension costs today, there is no reason to believe that they will begin to discriminate against women to save on pension costs if sex-segregated pension plans are outlawed. Indeed, it is less likely that a company would discriminate against women than against non-smokers, since the former practice would violate Title VII.

CONCLUSION

The Deferred Compensation Program of the State of Arizona is facially discriminatory on the basis of sex, offering to men life annuity options with higher monthly benefit levels than the life annuity options available to women retiring at the same age. Similarly situated men and women are not treated equally by these annuity plans, and the actuarial arguments offered in support of the legality of the plans do not prove otherwise, for those arguments go to class impact rather than individual impact. Banning such discriminatory retirement plans will not revolutionize or threaten the stability of the insurance industry. For all these reasons, and for those advanced in the Brief for the Respondents, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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